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# CPLR 4404(b): Codefendants Do Not Have Standing to Set Verdict Aside

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The *Hires* decision is both a logical development of *Israel* and a desirable attitude for the courts to take. *X* sues *A* and is denied recovery because of his own contributory negligence. If *X* subsequently sues *B*, a joint tort-feasor, *B* should be permitted to assert collateral estoppel to defeat the action. This follows only if the contributory negligence in the first action is identical to the contributory negligence that would be shown in the second action.[195] It is apparent that plaintiff has had his day in court on the issue of contributory negligence. Thus, there seems to be no reason for not expanding the scope of the *Israel* decision to situations of this type.

## ARTICLE 44 — TRIAL MOTIONS

### *CPLR 4404(b): Codefendants do not have standing to set verdict aside.*

In an unreported decision, the jury returned a verdict against defendants Petroff and Miszuk and in favor of defendant Brzezinski. The trial court, upon a motion by the codefendants Petroff and Miszuk, set aside all the verdicts, solely upon a determination that the verdict in favor of Brzezinski was contrary to the weight of the evidence.

In *Petroff v. Brzezinski*,[196] the appellate division, fourth department, interpreting CPLR 4404, reversed and reinstated the original verdict. The court held that although the verdict in favor of Brzezinski was contrary to the weight of the evidence, his co-defendants had no standing to move to set the verdict aside "because they were not his adversaries." [197]

It should be noted that the refusal of the court to hear the motion defeats the codefendants' possible right to contribution under CPLR 1401. Thus, Petroff and Miszuk are "aggrieved" to the extent that they lose the chance to reduce their damages. They

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121, 150 (1966). However, this case has been reversed by the Court of Appeals, and will be treated in the next issue of the *Survey*.

[195] See also Friedman v. Parklane Motors, Inc., 18 App. Div. 2d 262, 238 N.Y.S.2d 973 (1st Dep't 1963). The court permitted the defensive assertion of collateral estoppel, after it had been established in a previous action against a party not in privity with the defendant therein that plaintiff's intestate's injuries had not been caused by the accident.

[196] 24 App. Div. 2d 1072, 265 N.Y.S.2d 804 (4th Dep't 1965).

[197] Petroff v. Brzezinski, 24 App. Div. 2d 1072, 1073, 265 N.Y.S.2d 804, 806 (4th Dep't 1965). *Accord*, Schultz v. Alfred, 11 App. Div. 2d 266, 203 N.Y.S.2d 201 (3d Dep't 1960); Hughes v. Parkhurst, 284 App. Div. 757, 134 N.Y.S.2d 798 (4th Dep't 1954).

are placed at the mercy of the plaintiff who may, at his option, object to the verdict or accept it.[198]

### ARTICLE 51 — ENFORCEMENT OF JUDGMENTS AND ORDERS GENERALLY

*CPLR 5101: Court still has implied power to grant stays.*

CPA § 1520 provided that the non-payer of motion and other interlocutory costs was subject to an automatic stay of all proceedings on his part, except to review or vacate the order. CPLR 5101, which superseded CPA § 1520, omitted any mention of automatic stays as a means of enforcing payment of motion costs.[199] It was held, however, in *Associated Sales Analysts, Inc. v. Weitz,*[200] that the implied, discretionary power to grant stays for nonpayment of costs in prior actions was not nullified by this omission.

There are text writers who conflict with the court's interpretation of the legislative intent in omitting that portion referring to automatic stays in the CPLR.[201] It is their opinion that with execution available under Article 52, a stay of proceedings was entirely unwarranted as an additional method of enforcing the payment of motion costs.[202] While there is some language to this effect in the Fourth Report of the Advisory Committee,[203] there is no further mention made in any of the subsequent reports.[204] The court, however, reasoned that the incomplete legislative history, which dealt only with interlocutory costs, was insufficient to support the conclusion that the discretionary power to stay subsequent actions, a common-law power predating the mandatory stay provisions of the older statutes,[205] had been nullified. The court further reasoned that although execution might prove unsatisfactory, an irresponsible litigant might nevertheless continue to harass his adversary. Finally, the court noted that unlimited

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198 See Gregory, *Tort Contribution Practice In New York,* 20 CORNELL L.Q. 269, 271 (1935). In this regard, the plaintiff is presented with a choice analogous to his power to select his defendants from a number of joint tortfeasors. 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1401.02 (1965).

199 Associated Sales Analysts, Inc. v. Weitz, 25 App. Div. 2d 64, 266 N.Y.S.2d 852 (1st Dep't 1966).

200 *Ibid.*

201 See 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 5101.06-.07 (1965); 23 CARMODY-WAIT, NEW YORK PRACTICE §§ 302-04 (Supp. 1965).

202 *Ibid.*

203 FOURTH REP. 226.

204 Associated Sales Analysts, Inc. v. Weitz, *supra* note 199, at 66, 266 N.Y.S.2d at 855.

205 CPA § 1520, which was preceded by RCP 74.